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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 276

JOHN P. STORY, JR., TRADING AS STORY & CO.,
Petitioner,

vs.

JOHN W. SNYDER, LUTHER H. EVANS, C. WAYLAND BROOKS, AGNES E. MEYER, ADOLPH MILLER, AS TRUSTEES OF THE LIBRARY OF CONGRESS TRUST FUND BOARD,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HUGH H. OBEAR,
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GRANT W. WIPRUD,
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The petitioner, John P. Story, Jr., trading as Story & Co., prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit, entered June 12, 1950, affirming a judgment of the United States District Court for the District of Columbia dismissing for want of jurisdiction petitioner's complaint for moneys due under express and implied contract.

Opinions Below

No memorandum opinion was filed by the District Court in connection with its Order Sustaining Motion to Dismiss and Judgment Dismissing Complaint, which was filed Feb-

ruary 21, 1949. The opinion of the United States Court of Appeals, one judge dissenting (not yet officially reported), is found in the Record at page 11.

Basis of Jurisdiction

This Court has authority to review the judgment of the United States Court of Appeals for the District of Columbia Circuit under *28 U. S. C. (1948)sec. 1254 (1)* (Section 240 (a) of the Judicial Code as amended).

Question Presented

Whether a suit against the Library of Congress Trust Fund Board to recover a commission alleged to have been earned by a real estate broker through the sale of real estate owned by the said Board as trustee is a suit within the jurisdictional provision of *2 U. S. C. sec. 159, post,* and therefore cognizable in the United States District Court for the District of Columbia.

Statement of Facts

The facts of the case are detailed in the complaint (R. 4), the allegations of which have in effect been admitted by respondents' motion to dismiss. Petitioner, a duly licensed real estate broker in the District of Columbia, was authorized by the Library of Congress Trust Fund Board to list and offer for sale as its real estate agent and on its behalf certain real estate belonging to the Board and located at Sixteenth and I Streets, N. W., Washington, D. C. On September 28, 1945, petitioner, acting on behalf of the Board, and pursuant to the said authorization and listing, offered the property for sale to Eric Johnston, the latter acting for the Motion Picture Association of America, Inc.

Thereafter, the Motion Picture Association of America, Inc. bought the property directly from the Board for the

price of $600,000. Petitioner was the procuring cause of the sale; but notwithstanding this the Board made the sale without providing for payment to petitioner of any real estate commission. The usual and customary real estate broker's commission for such a sale amounted to $19,000 and this amount also represented fair and reasonable compensation to petitioner for his services rendered to the Library of Congress Trust Fund Board in the procuring of the sale. (R. 6.)

Petitioner brought the instant suit against the members of the Library of Congress Trust Fund Board, seeking to recover $19,000 due and owing to petitioner under express and implied contract (Complaint, R. 4). The defendants, respondents here, moved the District Court to dismiss the complaint on the ground that the court lacked jurisdiction of the subject matter of the action "for the reason that the defendants are an agency of the United States of America which has not consented to be sued or waived its immunity from suit." (R. 7.) On February 21, 1949, the District Court entered judgment dismissing the complaint for want of jurisdiction. (R. 8.) This judgment was appealed, and was affirmed by decision of the United States Court of Appeals for the District of Columbia Circuit entered on June 12, 1950, one judge dissenting.

Statute Involved

2 U.S.C. sec. 159:

> The [Library of Congress Trust Fund Board] shall have perpetual succession, with all the usual powers and obligations of a trustee, including the power to sell, except as herein limited, in respect of all property, moneys, or securities which shall be conveyed, transferred, assigned, bequeathed, delivered, or paid over to it for the purposes above specified. The board may be sued in the district court of the United States for the District of Columbia, which is hereby given juris-

diction of such suits, for the purpose of enforcing the provisions of any trust accepted by it. As amended Jan. 27, 1926, c. 6, sec. 1, 44 Stat. 2; June 25, 1936, c. 804, 49 Stat. 1921.

Specification of Errors to be Urged

1. The majority of the Court of Appeals concedes that under the first sentence of *2 U.S.C. sec. 159, supra,* "the Board has the power to incur brokerage expense when necessary to the performance of its functions" (R. 15, n. 5), but holds that the statute is not mandatory but merely directory, and of no obligatory force, in this respect. And, says the majority, "Whether or not the Board has power to pay a commission voluntarily has but little bearing upon the jurisdictional question raised here." (R. 15.) Petitioner assigns as error this holding of the majority, contending that the Board, in being clothed by the first sentence of *Section 159* with "all the usual powers and *obligations* of a trustee, including the power to sell," is not only empowered but is expressly obligated to pay the usual and customary expenses of sale, including real estate commissions earned by a real estate broker under an express or implied agency contract with the Board.

2. The majority of the Court of Appeals construes the second and final sentence of *Section 159* restrictively, and without reference to the first sentence of the section, as providing nothing more than assurance to donors "that if the Board [does] not carry out the provisions of a trust accepted by it (e.g., the establishment of a special collection in the name and memory of an individual), the aid of the courts [can] be invoked in enforcing the terms of the gift, as accepted." (R. 13.) Petitioner assigns as error this narrow interpretation upon which the Court of Appeals based its affirmance of the District Court's judgment of dismissal. Petitioner contends that both sentences of *Section 159* must

be read together; that the obligation imposed upon the Board by the first sentence to pay the usual and customary expenses of sale, including real estate commissions, constitutes a condition or provision implied by law in the terms of any power of sale given to the Board in respect of any gift accepted by the Board; and that this condition or provision is enforcible in the District Court under the provision of the second sentence of *Section 159* that the Board may be sued in the District Court "for the purpose of enforcing the provisions of any trust accepted by it."[1]

Reasons for Granting the Writ

1. *2 U.S.C. sec. 159, supra,* has not heretofore been construed by the courts. Hence the case at bar presents a question of first impression as to the ambit of the District Court's jurisdiction under *Section 159.* And this question is one "of substance relating to the construction or application of . . . a . . . statute, of the United States," within *Rule 38.5(c)* of the *Supreme Court Rules,* as amended, "which has not been, but should be, settled by this court." The question should be settled by the Supreme Court in order that real estate brokers, and others who in the usual course of business serve the Library of Congress Trust Fund Board in its administration of trusts, may enter into contracts with the Board and perform services for it with a certain knowledge of the extent (if any) to which the Board is obligated by the statute to honor its contractual obligations, and the extent (if any) to which the jurisdiction of the District Court may be invoked to compel performance of such obligation. Failure to settle the question will surely engender reluctance among private businessmen to deal with the Library of Congress Trust Fund Board.

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[1] Cf. the cogent reasoning of Judge Wilbur K. Miller in the final paragraph of his dissent to the opinion of the majority in the Court of Appeals. (R. 21.)

2. The identical language of *2 U.S.C. sec. 159*, in its entirety, is found in *16 U.S.C. sec. 19b*, which relates to the National Park Trust Fund Board. Like the former statute, the latter has never been construed by the courts; the same questions arise with regard to both statutes; and the ambit of the latter's jurisdictional provision having never been judicially determined, that provision is now clouded by the restrictive interpretation of *2 U.S.C. sec. 159* by the Court of Appeals in the case at bar. Apart from the above statutes, two statutes in the United States Code authorize payment of expenses attending the sale of realty.[2] These are: a) *40 U.S.C. sec. 74a-c*, which provides for sale by the Secretary of the Interior of surplus real estate in the District of Columbia coming under the jurisdiction of the National Park Service; b) *40 U.S.C. sec. 72c-d*, which provides for sale by the Commissioners of the District of Columbia of surplus real estate in the District of Columbia, owned by the District of Columbia. Both statutes provide, in identical terms, that the official or officials selling the property shall "pay the reasonable and necessary expenses of sale of each parcel of land sold." Neither of these statutes has been construed by the courts with regard to its provision for the payments of the expenses of sale. The opinion of the Court of Appeals in the case at bar lays open to question the nature of

[2] Until recently the United States Code contained a statute (40 U.S.C. sec. 304a-304a-1) conferring upon the Commissioner of Public Buildings broad powers to dispose of real property belonging to the Government, when located outside the District of Columbia, and empowering him, in connection with such sales, to pay "brokers' fees not in excess of rates paid for similar services in the community where the property is situated." However, while not expressly repealed, it would seem that this statute has been repealed by implication, inasmuch as the office of Commissioner of Public Buildings, together with the Federal Works Agency and other offices and agencies, was abolished by Section 103(b) of Act of June 30, 1949, c. 288, Title I, 63 Stat. 380, and all the functions thereof transferred, by Section 103(a) of said Act to the Administrator of General Services, and inasmuch as 41 U.S.C. secs. 232 and 233 govern the disposition of surplus property by the Administrator of General Services.

those provisions, i.e., whether they are mandatory, or whether they are directory merely, and impose no obligation upon the officials concerned to pay the expenses of sale.

3. Definitive construction by the Supreme Court of *2 U.S.C. sec. 159*, in the case at bar, would prove extremely helpful to lawyers and to business men in the interpretation of the above statutes, and would greatly promote certainty and confidence in the business relations between real estate brokers and others, on the one hand, and the National Park Trust Fund Board, the Secretary of the Interior, and the Commissioners of the District of Columbia on the other.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

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Statute:

Act of March 3, 1925, 43 Stat. 1108, as amended, 2 U.S.C. 159	2

In the Supreme Court of the United States

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JOHN W. SNYDER, LUTHER H. EVANS, C. WAYLAND BROOKS, AGNES E. MEYER, ADOLPH MILLER, AS TRUSTEES OF THE LIBRARY OF CONGRESS TRUST FUND BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The district court did not write an opinion. The opinions of the court of appeals (R. 11-26) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on June 12, 1950 (R. 27).

The petition for a writ of certiorari was filed on August 29, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254(1).

QUESTION PRESENTED

Whether an action for a brokerage commission upon sale of real estate is embraced within a statute vesting the trial court with jurisdiction of suits "for the purpose of enforcing the provisions of any trust accepted by" the Trustees of the Library of Congress Trust Fund Board.

STATUTE INVOLVED

Section 3 of the Act of March 3, 1925, 43 Stat. 1108, as amended, 2 U. S. C. 159, provides:

> The board [Library of Congress Trust Fund Board] shall have perpetual succession, with all the usual powers and obligations of a trustee, including the power to sell, except as herein limited, in respect of all property, moneys, or securities which shall be conveyed, transferred, assigned, bequeathed, delivered, or paid over to it for the purposes above specified. The board may be sued in the district court of the United States for the District of Columbia, which is given jurisdiction of such suits, for the purpose of enforcing the provisions of any trust accepted by it.

STATEMENT

On November 19, 1948, this action was instituted by petitioner in the United States District Court for the District of Columbia by filing a complaint naming as parties defendant the Trustees of the

Library of Congress Trust Fund Board (R. 4). The complaint, which was one for moneys due under express and implied contract, sought judgment against the respondents for the sum of $19,000 allegedly due as a real estate commission in connection with the sale by the Library of Congress Trust Fund Board of property located at Sixteenth and Eye Streets in northwest Washington, D. C. (R. 6).

On January 13, 1949, the respondents filed a motion to dismiss because the district court lacked jurisdiction of the subject matter of the action for the reason that the respondents are an agency of the United States of America, which has not consented to be sued or waived its immunity from suit (R. 7). The district court sustained the motion and its judgment dismissing the complaint was entered on February 21, 1949 (R. 8). The court of appeals affirmed the judgment, one judge dissenting (R. 27).

The majority opinion concluded that jurisdiction could not, as petitioners argued, be rested upon the 1925 Act because the consent to suit did not embrace actions by third party creditors of the Board to enforce liabilities incurred in administration of the trust. Judge Miller dissented primarily on the ground that this was not, as petitioner had conceded, a suit against the United States (R. 21-24). He also expressed the view that the present claim was embraced within the 1925 Act because of the terms of the trust agreement by

which the property was originally transferred to the Board, even though the agreement was not relied upon by petitioner.

ARGUMENT

The sole question here is the construction of a particular statute giving the United States District Court for the District of Columbia jurisdiction over a limited type of suits against the Library of Congress Trust Fund Board. The particular statutory language appears in but one other statute relating to the National Park Trust Fund Board. The point at issue, which has arisen in no other case, is therefore of limited applicability.

Petitioner does not challenge the ruling of the court below, that, as petitioner there conceded, this action constitutes an attempt to sue the United States. Petitioner seeks to present the question whether the Board is obligated to pay real estate commissions. No such issue is here involved.[1]

Little can be added to the thorough discussion by the majority opinion below pointing out that the consent to be sued extends only to suits to enforce provisions of trusts while this suit involves an alleged debt arising from the administration of a trust. Petitioner does not directly attack any of the reasoning of that opinion. While

[1] For this reason, other acts referred to by petitioner (p. 6) authorizing the Secretary of the Interior or the Commissioners of the District of Columbia to sell real estate are irrelevant here.

support is apparently sought from the dissenting opinion (Pet. 5 footnote), petitioner does not urge the theory upon which the dissenting judge sought to embrace this claim within the 1925 Act, i.e., that petitioner was a beneficiary of the trust agreement. Thus, petitioner suggests neither authority nor legal theory which would justify expansion of the 1925 Act beyond its express terms. As pointed out by the majority opinion below such expansion would do violence to settled principles relating to the construction of such statutes (R. 13-14) and would likewise run counter to established trust law (R. 15-16).

CONCLUSION

The decision of the courts below is clearly correct, and the case does not warrant review by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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